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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

CS Docket No. 01-7

To: The Commission

**JOINT COMMENTS OF THE GOLF CHANNEL, OUTDOOR LIFE NETWORK,
SPEEDVISION NETWORK AND THE WEATHER CHANNEL**

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March 19, 2001

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TGC Inc. d/ba The Golf Channel (“Golf”), Outdoor Life Network, L.L.C. (“OLN”), Speedvision Network, L.L.C. (“Speedvision”), and The Weather Channel (“TWC”) (collectively referred to herein as “Commenters”) submit these Comments in response to the Notice Of Inquiry issued by the Federal Communications Commission (“Commission”) concerning Nondiscrimination in the Distribution of Interactive Television Services Over Cable (“NOI”).

I. INTRODUCTION AND SUMMARY

The Commission’s NOI seeks information concerning whether regulations are presently needed in the emerging interactive television (“ITV”) services market. Commenters – a group of diverse program networks with competing and sometimes diverging interests – have joined together here to urge the Commission not to further consider the adoption of ITV regulations at this time.

Regulation of the nascent ITV industry is not presently warranted. The market is very young, with new products and technologies still developing, new players still emerging, business models still under development and industry relationships still forming. As the Commission

itself admits, the market is evolving so rapidly that it is difficult to define. Industry experts, too, have difficulty defining the products, services and features that constitute ITV.

Moreover, there is no demonstrated need for regulation at this time. The Commission has not identified any evidence of discrimination in the market for ITV services. Instead, the crux of the Commission's NOI is that cable television *may* be a superior platform for distributing ITV services, and thus, cable operators *may* have incentives to discriminate. In reality, the market, though young, appears so far to be developing without evidence of dominance by any one player or group of players. Independent ITV providers are a significant source of interactive products and services and are entering into agreements with a variety of players, including cable operators, DBS providers, and vertically and non-vertically integrated programming networks. Indeed, even cable operators with financial interests in ITV vendors are entering into agreements with non-affiliated vendors. The marketplace has not yet exhibited a need for regulation.

In the past, when faced with similar calls for regulation of other "new technologies," the Commission has wisely refrained. As recognized by the Commission in those instances, premature regulation can stifle investment, innovation and development. Even the threat of regulation in the form of an overly aggressive NOI could have negative effects on investment, especially in an already softening economy. Premature regulation of ITV could also create an administrative nightmare, as regulators struggle to keep pace with and impose limits on an industry taking off in multiple directions that the Commission today could hardly even predict.

In short, the ITV market, while young, currently appears to be working without need for government regulation or intervention. The Commission should refrain from considering regulation of ITV at this time.

II. IDENTIFICATION AND INTEREST OF COMMENTERS

Commenters are four quality programming networks that are competitors in many respects, but that have joined together here to urge the Commission to refrain at this juncture from instituting any proceeding that could lead to regulation of the ITV market. Commenters are comprised of both affiliated and non-affiliated program networks that distribute various genres of programming targeted to different audiences. Commenters also operate pursuant to different business models and are at various stages of development and deployment of ITV services. For example, TWC signed its first ITV distribution agreement in 1997 and has been developing, refining, and providing interactive services ever since. Today, TWC reaches approximately four million homes with interactive services via both satellite and cable. Outdoor Life and Speedvision currently are negotiating with various ITV providers to test ITV services as soon as June of this year. Golf, on the other hand, has had discussions with ITV providers, but has not yet scheduled any ITV tests. Despite their differences, Commenters unanimously agree that regulation of the ITV market is not warranted at this time, and that the Commission should not presently embark upon efforts to regulate ITV.

A. Who We Are

The Golf Channel was launched in January 1995, and currently distributes its programming to over 32 million subscribers within the United States. The Golf Channel is the only 24-hour network devoted exclusively to golf programming, offering new and unique programming tailored to golf enthusiasts. Golf provides in depth coverage of more than 90 professional golf tournaments from around the world, and features other golf-related programming, including instructional programming from top golf teaching professionals and up-to-the minute golf news and statistics.

Outdoor Life, which launched in June 1995, services approximately 35 million subscribers. The network is targeted at outdoor enthusiasts, and its programming focuses on outdoor and environmental activities and interests, such as wildlife and wilderness conservation, fishing, mountaineering, hunting, camping, backpacking, mountain biking, white water sports and skiing. Outdoor Life provides live coverage of events such as skiing, snowboarding, equestrian, and bicycle competitions, including the legendary Tour de France.

Speedvision launched in January 1996, and currently serves approximately 40 million subscribers. The network offers never-before-viewed programming targeted at boating, aviation and automobile/motorcycle enthusiasts. Speedvision provides magazine and lifestyle programs, historical documentaries, current news and information, and instructional how-to programs. Speedvision also provides coverage of major professional racing events from around the world, spanning the complete spectrum from formula cars to racing yachts.

The Weather Channel launched in 1982, and currently serves more than 78 million homes in the United States. The network provides comprehensive forecasts and weather-related information for more than 77,000 locations around the globe. The network provides special segments throughout the day that feature content highlighting the impact of weather on everyday life, including sport, travel and health. The network also provides seasonal reporting, such as the Annual Fall Foliage Guide, and reports on skiing conditions at resort areas around the country.

B. Our Interests In This Proceeding

Three of the Commenters, Golf, Outdoor Life and Speedvision are only beginning to experiment with how they might use interactive services in connection with their programming. TWC has been developing and refining its ITV services since 1997, when it entered into its first ITV agreement with WebTV. All of the Commenters view interactivity as a way to provide

additional value to viewers by enhancing their traditional television programming, providing additional advertising and informational services to customers, as well as a means of generating an additional revenue stream.

However, Commenters are cautious about investing too heavily in a market that does not yet offer a proven and reliably profitable business model.¹ Likewise, other program networks, ITV service providers, cable operators and other MVPDs who must also invest heavily in the development of the technology and innovative services necessary to satisfy growing ITV consumer demand, are approaching the ITV business model with guarded optimism, as are the financiers who must provide the capital necessary to develop ITV services.² While some analysts predict that interactive TV will swell into a \$30 billion business within the next five years, it is still unclear how advertisers and consumers will respond to their interactive options, particularly in a softening economy.³ Given these risks, added regulatory hurdles, or even the prospect of such regulation, may hinder the ability of programming networks, such as Commenters, as well as ITV service providers and MVPDs, to develop or deploy ITV services.

¹ The Golf Channel has been approached by several ITV service providers, but has decided to “wait and see” how the market develops, what business models evolve, and what services emerge that would support Golf’s programming and audience.

² David Ward, *Experts Say Interactive TV Profits Still Are Years Away*, COMMUNICATIONS DAILY, Today’s News, March 1, 2001; Monica Hogan, *ITVers Say Business Models Will Come*, MULTICHANNEL NEWS, Feb. 5, 2001 <http://www.tvinsite.com/multichannelnews...ews&doc_id=&articleID=CA62081&pub_id=MCN>.

³ Diane Mermigas, *The Very Big Engine That Could; AOL TW Seeks Synergy, Savings and Massive Corporate Muscle*, CRAIN COMMUNICATIONS INC., January 22, 2001, at 1.

III. THE ITV MARKET STILL IS IN ITS FORMATIVE STAGES

The ITV services market is rapidly developing and is comprised mostly of players that have been in existence for less than a decade, while new players are still emerging. Distribution platforms are also still evolving and developing. Even as these players and distribution platforms develop, it is still unclear what products and services make up the concept that is ITV. Industry experts cannot agree upon a definition of ITV services, and the broad definition proffered in the NOI lends little structure to the debate. It is hard to imagine how the Commission could begin to regulate a technology that still eludes definition.

A. The Full Panoply Of ITV Services Is Not Yet Clear

As the Commission correctly points out in its Notice Of Inquiry, “[t]he nature of ITV services is evolving rapidly, with constant and continuous technological changes and evolving business models making it difficult to specify a definition.”⁴ Just a week before the Commission released its NOI, former Chairman Kennard opined, “[y]ou can talk to a dozen different people and get a dozen definitions of interactive TV. It’s too early to impose specific conditions.”⁵ In fact, that is exactly what happened during a recent Interactive TV Advertising USA conference. Various industry members batted around definitions of ITV until ultimately they gave up, with one member concluding, “[w]e can’t define it, so how does the consumer?”⁶

The Commission attempts to define ITV in the NOI as “a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams.”⁷ The

⁴ NOI at ¶ 6.

⁵ Jim Landers, *FCC Sets Conditions for AOL Time-Warner Merger*, THE DALLAS MORNING NEWS, Jan 13, 2001.

⁶ Craig Leddy, *Remember: I In ITV Isn’t For Internet*, MULTICHANNEL NEWS, Feb 12, 2001, at 42.

⁷ NOI at ¶ 6.

Commission offers possible examples of ITV including activation of program guides, alternate camera angles and “t-commerce.”⁸ Similarly, in its Seventh Annual Competition Report, the Commission offered such broad ranging examples of ITV as video on demand (“VOD”), e-mail, TV-based commerce, Internet access and program-related content, and use of digital set-top boxes and other devices that interface with television receivers (e.g., WebTV).⁹ In fact, ITV is so broadly defined that any use of a remote control or any other device, such as a wireless keyboard, that consumers use to access television or set top box services could be said to constitute ITV.

The breadth of the Commission’s proposed definition and examples, however, underscores the fact that there are countless products and services that have not yet surfaced but that may constitute ITV. Other than electronic program guides, relatively few video-programming distributors currently are utilizing interactive services. Many interactive services are being developed and tested, and some are actually being deployed, but this is a market that is so new that some of the Commenters (Outdoor Life, Speedvision and Golf) have only recently even begun to factor ITV into their business models. These networks recognize that, while there are many possible applications for interactive services in conjunction with their programming, many of those have yet to even be conceived and the business models have not yet been developed.

⁸ *Id.*

⁹ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report, FCC 01-1 (rel. January 8, 2001) (“*Seventh Annual Competition Report*”), at ¶ 15.

B. It Is Too Early To Know What Companies, Or Even Categories Of Companies, Will Establish Themselves As Major ITV Players, And What Relationships Will Be Formed

The NOI is equally unclear as to who the Commission considers to be ITV service providers. ITV service providers may include companies that distribute electronic program guides such as Gemstar-TV Guide, and those that distribute personal video recorders such as TiVo Company. ITV vendors could also include companies that provide services that include Internet browsing and e-mail over the television, such as AOLTV, Web-TV, and Worldgate; companies that provide operating systems on set-top boxes such as Motorola, Pioneer, Scientific Atlantic and Phillips; or “middleware” providers such as Microsoft, OpenTV, PowerTV, Worldgate, Canal Plus, Sun Microsystems, and Liberate. Other ITV providers such as Intertainer, Diva, ICTA, Wink and RespondTV, who act as “application” providers for the distribution of video-on-demand services and interactive advertising, might also be included within the definition. At this point, though, any predictions are purely speculative.

The Commission also fails to identify clearly the relationships that it would consider regulating, in large part because neither the Commission nor the industry can presently predict with much accuracy the nature of these relationships or how they might work. The Commission stated in its NOI that video programming networks may be ITV providers, or may contract with ITV providers to provide associated ITV enhancements.¹⁰ Some Commenters are still at the earliest stages of exploring ITV and cannot yet tell the Commission the extent of what their relationship with other ITV providers will be. Outdoor Life, for example, currently is in discussions with several ITV providers concerning interactive tests on each network. In some instances, the network will help develop the interactive content, and therefore may be considered

¹⁰ NOI at ¶ 9.

an ITV provider. In other instances, ITV services will relate to advertising promotions and the content will be aired on the network, but the network itself will not assist in its development.

While some of the Commenters will develop content for their own ITV service offerings, and therefore be considered ITV service providers, each will have to enter into relationships with other ITV service providers, whether affiliated or not, who can provide the software and hardware required to actually distribute ITV services to the consumer. The Weather Channel, which has been involved with ITV since 1997, develops much of its own “interactive” content, such as local forecasts and weather maps, itself, but it enters into agreements with ITV providers and distributors who provide the software and hardware necessary to enable consumers to view the interactive content.¹¹ Some of TWC’s relationships were formed several years ago, while many others, like the industry and its technology and services, are still developing.

Other program networks in the developmental stages of ITV have only begun to forge relationships necessary to provide ITV. A&E Networks, for instance, recently signed an agreement with Intertainer, an ITV service provider unaffiliated with A&E, in an effort to make programs from A&E and The History Channel available via video-on-demand.¹² ESPN, too, just completed a major ITV test with three ITV providers and 3.2 million subscribers.¹³ ESPN explained its use of three separate and unaffiliated ITV providers by saying, “we want to partner with as many [ITV providers] as we can in the early stages, because we hope to learn both

¹¹ TWC has entered into agreements with a number of ITV service providers including Wink, RespondTV, Worldgate, Liberate, Microsoft, Source Media, Canal Plus, Sun Microsystems, AT&T and DirecTV, among others.

¹² *A&E Television Networks Teams With Intertainer To Bring Network’s Popular Programming To VOD For The First Time*, January 16, 2001, <<http://www.intertainer.tv/intertainer/corporate/news/ane.html>>.

¹³ *ESPN Tests Interactive TV Platforms*, Yahoo Advertising News <www.yahoo.com>, Monday February 5, 2001. Each of the ITV providers used by ESPN was affiliated with a cable MSO, but also had received funding from broadcast and/or cable networks, DBS providers, equipment manufacturers, and even telephone companies. <<http://www.commerce-tv.com/seriesc.html>>; <http://www.respondtv.com/partners_investors.html>; <<http://www.wink.com/contents/partners5.shtml#investors>>.

programming- and advertising-oriented information from each type of test.”¹⁴ Speedvision, as well as other networks,¹⁵ still are grappling with ways to converge traditional television services with interactive online services, and are considering the types of relationships that will be necessary to achieve that convergence.¹⁶

C. The ITV Distribution Platforms Still Are Unsettled

Cable television is not the only viable platform for distribution of ITV services. As the Commission noted in its most recent competition report, “interactive television (‘ITV’) services are beginning to be offered through cable, satellite, and terrestrial technologies.”¹⁷ While it is presently unclear what share of the ITV market these services will capture, there is little doubt that they will play a significant role in the delivery of ITV services, as they have in the delivery of multi-channel video programming.

For example, TWC has contracted with DirecTV for distribution of program enhancements to “The Weather Channel” programming, and they also have developed a separate “virtual” channel. “Instant Weather.” In addition to its relationship with TWC, DirecTV partnered with America Online (“AOL”) in 1999 to provide “AOLTV” through a specially designed set-top box.¹⁸ The service provides interactive and “web surfing” Internet services over

¹⁴ *Id.*

¹⁵ Neil Irwin, *BET tries New Approach To Convergence*, Washington Post, February 26, 2001; <<http://www.washtech.com/news/media/7872-1.html>>.

¹⁶ Speedvision currently is using its television programming to send viewers to its Internet site and vice-versa. For example, in the program “E-Classics presents Barrett-Jackson Online Auction,” a car is presented on the television show, and the viewer is then directed to a Speedvision affiliated Internet site where the viewer can start bidding and the initial bids are broadcast in real-time over the television. When the television show ends, the bidding continues for several days, and then results are posted on the Internet.

¹⁷ *Seventh Annual Competition Report* at ¶¶15 and 207.

¹⁸ AOL DirecTV in Strategic Alliance, allNetDevices, <<http://devices.internet.com/news/Q29906/990621aol/990621aol.html>>, June 21, 1999.

the television. The DirecTV/AOL partnership expects to begin marketing its “DirecTV Broadband Powered by DirecPC” broadband service within the next several weeks.¹⁹ DirecTV has also formed partnerships with WebTV, TiVo and Wink Communications to provide interactive services.²⁰ Additionally, while DirecTV currently uses narrowband return path, DirecTV plans to switch to Ka-band technology within the next two years in order to provide its new "Spaceway" service, which would offer faster connections than DirecPC's Ku-band service.²¹ While the predicted launch is two years away, the rapid development of technology may provide DBS providers with faster connections prior to that date.

Echostar and its partner StarBand Communications launched high-speed two-way Internet service last November.²² Echostar retails a set-top box with personal video recorder capabilities, and it too has a strategic partnership with Wink Communications and WebTV.²³ Echostar also has partnered with OpenTV to provide interactive virtual services. Both DirecTV and Echostar distribute electronic program guides, which were defined by the Commission as an ITV service in its NOI.²⁴ Additionally, Pegasus Communications, a DirecTV reseller, plans to roll out its two-way Internet service, “Pegasus Express Powered by DirecPC,” any day.²⁵

¹⁹ <<http://www.directv.com/about/abouttablepages/0,1271,322,00..html>>.

²⁰ *Id.*

²¹ Monica Hogan, *DBS Providers Set Two-Way Broadband Plans*, MULTICHANNEL NEWS, April 17, 2000, at 53.

²² StarBand Communications, partnered with Echostar’s Dish Network, launched its two-way high-speed Internet service on November 7, 2000. *Seventh Annual Competition Report*, at ¶ 78.

²³ <<http://www.wink.com/contents/partners2.shtml>>; <<http://www.webtv.com/company/press/archive/echostar.html>>

²⁴ NOI at ¶ 6.

²⁵ Monica Hogan, *DBS Turns Eye Towards Two-Way Data Services*, MULTICHANNEL NEWS, Feb. 12, 2001, at 33.

Telephone companies offering DSL are already working with ITV service providers offering video-on-demand (“VOD”) services, a service identified by the FCC as an ITV service.²⁶ VOD over DSL is being deployed or tested around the country, as is the technology required to deliver multiple channels of video programming over telephone wires, similar to a traditional cable service.²⁷ ZoomTown.com, a company that has partnered with Intertainer, uniView Technologies and Microsoft Corp., claims that it will be “the first provider to make [ITV] a reality for DSL subscribers.”²⁸ While the telephone companies are not currently providing video content comparable to traditional cable on a widespread basis, the technology is being refined, and it is entirely possible that a full range of ITV services will be available over DSL in the near future.

While the Commission states in its NOI that “it is not yet clear how competitive to cable the satellite service will be,”²⁹ it also recognizes that broadband satellite services will have a substantial market in the estimated 20 to 30 million homes in rural and suburban areas that may be unable to receive cable or DSL for the foreseeable future.³⁰ Regulation, at this time, may

²⁶ *Telcos Testing Video Services Over DSL*, Planet IT, September 7, 2000, <www.planetit.com/techcenters/docs/advanced_ip_services/news/>.

²⁷ This type of service requires the use of VDSL lines or other advanced DSL lines, which have not, to date, been as widely deployed as other advanced DSL services. On a national level, US West launched VDSL in Phoenix, Arizona to several hundred customers who now receive the equivalent of traditional cable television service and Internet connections over ordinary telephone lines. John Borland, *Phone Companies' TV Ambitions On Chopping Block*, CNET NEWS.COM, August 30, 2000. Similarly, smaller telephone companies in areas surrounding major television markets such as Dallas, San Antonio and Atlanta, as well as rural telephone companies and their CLEC affiliates are deploying advanced DSL services. Richard Williamson, *Small Towns Take a Shine to Video Over Copper*, INTERACTIVE WEEK, December 18, 2000; Gail Lawyer, *Rural Telcos Lead Way with Video Over DSL*, XCHANGE MAGAZINE, March 2001; *Telcos Testing Video Services Over DSL*, Planet IT, September 7, 2000, <www.planetit.com/techcenters/docs/advanced_ip_services/news/>.

²⁸ *Broadwing Pioneers DSL Delivery Of Broadband Entertainment-On-Demand To Consumer TVs*, Intertainer News Releases, <http://www.intertainer.tv/intertainer/corporate/corp_news.html>, October 26, 2000.

²⁹ NOI at ¶ 19.

³⁰ *Seventh Annual Competition Report*, at ¶ 79.

hinder or alter the course of that development. As Chairman Powell previously has noted, “we must avoid the temptation to ‘shape’ the development of markets and instead let the market mechanism make those decisions.”³¹

IV. THE ITV SERVICE MARKET APPEARS TO BE WORKING

To the extent that relationships have been formed in the ITV market, there is no evidence to date of discrimination or dominance by any one player or group of players. There are numerous entities providing various ITV services to both affiliated and unaffiliated distributors. Cable operators have entered into agreements with unaffiliated ITV service providers. All indications thus far point toward more entrants providing new interactive services—not a “monopoly” of a few cable-owned ITV providers distributing services on affiliated cable systems and offering interactive services to their affiliated programming networks. In this environment, there is no present need to impose non-discrimination obligations on cable operators or affiliated entities that provide ITV services when there is no current evidence of discrimination.

A. There Is No Evidence To Date Of Discrimination Or Dominance By Or Among Cable Companies Or Cable Company Affiliates

The Commission begins its inquiry by asking whether it should impose some form of non-discrimination obligation on cable operators or affiliated entities that provide ITV services.³² In posing this question, the Commission does not cite examples of discrimination in the marketplace, but instead proposes to consider such regulation based on its tentative conclusion that “the modern cable television plant is likely to be the superior platform for distribution of

³¹ Remarks by Michael K. Powell, Commissioner, Federal Communications Commission, Before the Progress and Freedom Foundation, (December 8, 2000) (“Powell 12/8 Remarks”).

³² NOI at ¶ 3.

high speed ITV services.”³³ Based on this premise, the Commission hypothesizes that cable operators may have the incentive and the ability to favor affiliated ITV service providers over non-affiliated ones.”³⁴

Contrary to the implication of the Commission’s hypothesis, there is no evidence of discrimination in the ITV market at this time. In fact, at least at the present time, just the opposite appears to be true. Wink Communications, backed in part by both DirecTV and Paul Allen (Charter Communications, Inc.), has contracted with both cable operators and DBS providers to offer interactive enhancements that permit viewers to order products, request information, play trivia games, review sports statistics, and more.³⁵ Wink Communications has created partnerships with affiliated and unaffiliated cable and broadcast programming networks, retailers, and equipment manufacturers.³⁶ Wink’s diverse contractual relationships are representative of the current ITV market in general. Intertainer, Inc. has formed strategic partnerships with Comcast, US West, Sony, Intel and NBC to provide VOD services to both cable and DSL providers.³⁷ These diverse relationships demonstrate that the market is working without regulation.

³³ *Id.*

³⁴ *Id.* at ¶ 21.

³⁵ <<http://www.wink.com/contents/partners.shtml>>

³⁶ *Id.* For example, Wink has agreements with Charter Communications, an affiliated cable operator, as well as unaffiliated cable operators such as AT&T, Insight Communications, Cox, Comcast, Time Warner, Adelphia and Rogers Digital Cable. On the DBS side, Wink has agreements with both DirecTV, an investor, as well as Echostar, an unaffiliated provider. Wink has relationships with TNT, CNN and other vertically integrated programming networks, as well as The Weather Channel and other non-vertically integrated programming networks.

³⁷ *Intertainer Begins TV Set-Top Box Trial with Comcast*, Intertainer News Release, December 14, 1999, <<http://www.intertainer.tv/intertainer/corporate/news/13.html>>; *Set-tops to Deliver Net-Based Video*, allNetDevices, September 6, 2000 <http://www.allnetdevices.com/wired/news/2000/09/06/set-tops_to.html>.

B. There Are Numerous Players Entering The ITV Industry With Varying Characteristics

While the field of ITV service providers is in no way fixed, there are already numerous companies operating within the industry. Programming networks, such as MTV Networks, are providing interactive services that correspond to their television programs.³⁸ Software providers Microsoft, OpenTV, PowerTV, Liberate, Canal Plus and Worldgate all provide operating systems to cable MSOs and DBS companies. Other companies such as Wink Communications, ACTV, Inc. and RespondTV provide interactive enhancements that allow a customer to make choices such as ordering products or requesting information, checking weather for various cities, viewing a sports program from a different angle, and more, while continuing to watch the program.³⁹ VOD companies such as Concurrent Computer Corporation, Intertainer, Sea Change, Diva Systems and Enron Broadband Services offer services that allow a viewer to select and view movies and other programming in real-time.⁴⁰ TV Guide, Tribune and WorldGate provide electronic program guides that offer subscribers the ability to retrieve information not displayed on the general screen.⁴¹ TiVo, Microsoft and ReplayTV provide personal video recorder (“PVR”) technology.⁴² This list is far from exhaustive and will continue to expand as the ITV market grows and the technology matures and is more widely deployed.

³⁸ Cameron Crouch, *TV Channels on the Web; Television Eyes the Future of the Internet*, NETWORK WORLD, September 16, 1999.

³⁹ <<http://www.wink.com/>>; <www.actv.com/flash/main.html>; and <<http://www.respondtv.com/inaction.html>>.

⁴⁰ <http://www.ccur.com/vod/vod_solutions.html>; <http://www.divatv.com/diva_home.html>; <<http://www.enron.net/index2.html>>.

⁴¹ <www.tvguide.com>; *Seventh Annual Competition Report*, at ¶ 201; Steve Donohue, *TVGateway Wins Some Subs*, MULTICHANNEL NEWS, Feb. 12, 2001, at 1;

⁴² <www.tivo.com>; <www.replaytv.com>.

Moreover, the characteristics of these ITV service providers are as diverse as the services they offer. While all of the ITV service providers are relatively young in relation to more established players in the communications industry, their other characteristics vary widely. Some have well-recognized brand names such as "AOLTV" and "TV Guide," while others remain relatively unknown to the public and merely provide software, technological services, or networks, such as Enron Broadband Services.⁴³ Some ITV service providers, such as AOLTV, are affiliated with cable MSOs,⁴⁴ while others, such as WebTV, remain unaffiliated with any cable provider.⁴⁵

Entities with competing interests have invested in the same ITV providers. For instance, Wink Communications has garnered investments from a diverse group including DirecTV, Paul Allen's Vulcan Ventures, Microsoft, Toshiba and others. Similarly, the programming network Starz! Encore has made a multimillion-dollar investment in the VOD and IPG provider DIVA Systems, in addition to investments from the software company OpenTV, Charter Communications, equipment manufacturer Motorola and others.

C. Cable Operators Are Entering Into Market Based Contractual Relationships With Unaffiliated ITV Service Providers

Perhaps the best indication that the ITV market appears to be working comes from the fact that cable companies are entering into distribution agreements with unaffiliated ITV service providers. For example, Charter Communications, Inc. recently entered into a 10-year

⁴³ While Enron's agreement with Blockbuster Inc. recently fell through, Enron is "still bullish on the VOD business and would look to secure its own studio deals." R. Thomas Umstead, *"Blockbuster-Enron Deal Fades to Black,"* MULTICHANNEL NEWS, March 19, 2001, at 32.

⁴⁴ *"America Online & Time Warner Complete the Merger to Create AOL Time Warner,"* <http://media.aoltimewarner.com/media/press_view.cfm?release_num=50252141>.

⁴⁵ In 1997, Microsoft Corporation acquired WebTV Networks, Inc., and now WebTV Networks operates as a subsidiary of Microsoft. <<http://www.webtv.com/company/index.html>>.

distribution agreement with unaffiliated Gemstar-TV Guide for distribution of the Gemstar-TV Guide electronic program guide, notwithstanding Charter's investment in TV Gateway, a competing ITV provider.⁴⁶ Examination of the Websites of ITV service providers reflects that the relationships in this market are not limited to affiliated cable companies or programming networks, but span across distribution platforms. AOLTV, financially backed by Time Warner, is working with DirecTV to develop its service.⁴⁷ Wink Communications, whose primary investors include DirecTV and Paul Allen (Charter Communications, Inc.), is forging relationships with competing cable companies, programmers and advertisers.⁴⁸ Indeed, Comcast, an investor in RespondTV, has launched its interactive services using Wink.⁴⁹ The existence of these relationships indicates that discrimination is not presently a problem in this developing industry.

V. GOVERNMENT REGULATION AT THIS TIME WOULD NOT ONLY STIFLE DEVELOPMENT, BUT WOULD BE UNWORKABLE AND CAN, JUSTIFIABLY, BE AVOIDED

As Chairman Powell has stated, “[i]t is now established, without much question, that free markets work better than any other economic form ever tried by mankind to allocate resources, to inspire innovation, to maximize public welfare, and even to protect and empower individuals.”⁵⁰ Premature regulation of ITV – or even the specter of such regulation – could deter

⁴⁶ Steve Donohue, *Charter Deal Boosts Gemstar Stock*, <www.multichannelnews.com>, Feb. 20, 2001; Steve Donohue, *TVGateway Wins Some Subs*, MULTICHANNEL NEWS, Feb. 12, 2001, at 1.

⁴⁷ <<http://www.aoltv.com/about.html>>.

⁴⁸ <<http://www.wink.com/contents/PressCoverage.shtml>>.

⁴⁹ <http://www.respondtv.com/partners_investors.html>; <<http://www.365broadcast.com/cgi-bin/email.cgi?news=0903B002.shtml>>.

⁵⁰ Remarks by Michael K. Powell, Commissioner, Federal Communications Commission, Before the Federal Communications Bar Association (Chicago Chapter), June 15, 2000 (“Powell 6/15 Remarks”).

financial investment and technological advances currently being made in the ITV market place. This Commission has refrained from regulating nascent technologies for similar reasons in the past, and in recognition of the substantial burden it would face in attempting to regulate such formative and rapidly evolving markets.

A. Premature Regulation Could Stifle Investment, Innovation and Development

The investment required to launch and sustain a quality cable network is enormous. Program networks will require additional capital to develop and deploy ITV. Both Wall Street and Silicon Valley previously have cautioned the Commission that the threat of government regulation in and of itself has a negative effect on capital.⁵¹ In a letter to the Commission dated August 29, 2000, Mr. Thomas V. Beard of Deutsche Banc Securities explained that “[i]n order for new technologies to survive it is imperative that these technologies should not experience undue regulatory delays which most certainly discourage the vital infusion of venture capital into the domain of ‘regulated technology.’”⁵² In a similar vein, Dennis Leibowitz of Donaldson, Lufkin & Jenrette warned former Chairman Kennard in 1998 that, in view of the present market conditions and past market history, “the hint” of regulation at all would “chill” investment in new services.⁵³ Although that warning was offered in the context of the 1998 stock market, the threat of regulation today could have an even greater impact given the skittishness seen in the technology sector over the last year. Market analysts are relying on the Commission to embrace the deregulatory spirit of the 1996 Act in order to steady the stock market, claiming that the “boom-and-bust cycle that has

⁵¹ Letter from Donaldson, Lufkin & Jenrette, to FCC, October 7, 1998; Letter from Intel, Compaq, Cisco Systems, IBM, Novel to FCC, December 9, 1998; Letter from The Bank Of New York, to FCC, October 6, 1998; Broadband Today, Staff Report of Deborah A. Lathen, Bureau Chief, Cable Services Bureau to William E. Kennard, Chairman, Federal Communications Commission, On Industry Monitoring Sessions Convened by Cable Services Bureau, October 1999 at 34 (“*Broadband Today Report*”).

⁵² Letter from Thomas Beard, Deutsche Banc Securities Inc., to FCC, August 29, 2000.

⁵³ Letter from Dennis H. Leibowitz, Donaldson, Lufkin & Jenrette Securities Corporation, to FCC, October 7, 1998.

defined telecommunications in recent years was itself the product of the regulatory climate.”⁵⁴ While these warnings were offered in contexts other than ITV, they apply with equal force to the ITV market. Indeed, the Commission itself seemingly recognized this by questioning whether Commission rules would restrict capital investment in ITV services.⁵⁵

In addition to stifling investment, premature regulation of the ITV market could also discourage testing and development of new interactive applications. ITV providers such as Integra5, a new entrant in the ITV market, are claiming that government “meddling” could “stymie the marketplace.”⁵⁶ As recognized recently by Cable Services Bureau Chief Deborah Lathan, companies may be reluctant to pursue technological innovations if they fear the Commission will immediately demand that competitors receive access to those communications networks.⁵⁷ “We need to look for ways to incentivize innovation.”⁵⁸

Aside from the impact regulations would have on the industry as a whole, any regulation at this time would have a direct affect on Commenters. The threat of regulation alone could impact Golf’s decision as to whether it should enter the ITV market. Additionally, while it is unclear what type of regulations the Commission would propose as a result of the NOI, any regulation or proposed regulation that would restrict or negatively impact Speedvision’s or Outdoor Life’s deployment of ITV services would cause the networks to review, and possibly reconsider, their ITV business plans. While TWC, on the other hand, would continue with its development of ITV

⁵⁴ Peter S. Goodman, *A Hot Sector Burns Out; As Investors Stop Calling, Companies Search For Answers*, The Washington Post, G-1, February 28, 2001.

⁵⁵ NOI at ¶ 20.

⁵⁶ Michael Grebb, *Vendors Wary of ITV Inquiry*, MULTICHANNEL NEWS, Feb. 26, 2001, at 1, 62.

⁵⁷ *More Power To You*, BROADCASTING & CABLE, Feb. 26, 2001, at 12.

⁵⁸ *Id.*

services, FCC regulation of the ITV market would undoubtedly affect ITV business models and investment incentives, and affect TWC's ability to deliver ITV services to its subscribers by regulating other ITV providers with whom TWC has contracted.⁵⁹

Allowing ITV providers and their business partners the flexibility to work out their own business plans and abilities in the free market is the best means for assuring benefits to consumers of various interactive offerings, with far more potential for product differentiation than would arise under a government-managed program.

B. Premature Regulation Of ITV Would Unnecessarily Burden The Commission With An Impossible Task

As former Chairman Kennard recognized, governmentally compelled business arrangements are easier to imagine in broad strokes than to implement in reality.

I also know that it is more than a notion to say that you are going to write regulations It is easy to say that government should write a regulation It is quite another thing to write that rule, to make it real and then to enforce it. You have to define what discrimination means. You have to define the terms and conditions of access. You have issues of pricing that inevitably get drawn into these issues of nondiscrimination. You have to coalesce around a pricing model that makes sense so that you can ensure nondiscrimination. And then once you write all these rules, you have to have a means to enforce them in a meaningful way.⁶⁰

While Chairman Kennard was speaking in the context of creating regulations "to open the cable pipe," his statements are no less true when put in the context of ITV. Because the Commission's proposed category of "ITV services" could include everything from the use of

⁵⁹ In the NOI, the Commission proposed to require a cable operator to provide the same amount of "enhancement bandwidth" to all ITV providers. NOI at ¶ 26. What the Commission fails to consider, however, is that different enhancement services will require different bandwidth. For example, the interactive enhancements provided by TWC, such as local forecasts and RADAR maps provided for multiple locations, require considerably more bandwidth than many other types of program network enhancements.

⁶⁰ "Consumer Choice Through Competition," Remarks by FCC Chairman William E. Kennard at the National Association of Telecommunications Officers and Advisors 19th Annual Conference, Sep. 17, 1999 (visited Nov. 8, 1999) <<http://www.fcc.gov/commissioners/kennard/speeches.html>>

personal video recorders to program-related enhancements embedded in the video signal, the relationships concerning the provision of those ITV services will be just as diverse. In some situations, the ITV provider will have a relationship directly with an equipment manufacturer to include certain technology in a set-top box.⁶¹ In other situations, the ITV provider will contract directly with the program network or the program distributor, or both, for distribution of interactive program-related enhancements. When a program network provides its own program-related enhancements, it will have to negotiate directly with the program distributor for inclusion of those enhancements. Some ITV providers will have relationships across the board—with program networks, program distributors, equipment manufacturers, and software companies.⁶² Different ITV providers will reach different deals with MVPDs or program networks based on different economic models and different carriage arrangements.⁶³ The Commission's regulations would have to address not only these providers and their relationships, but additional providers and relationships that most certainly surface in the future.

Any regulations in the ITV industry would inevitably require the Commission to define a “non-discriminatory” price and “reasonable” provisioning, as well as definitions of “affiliated” and “unaffiliated,” and “vertically integrated” in the context of ITV providers. The Commission has spent years and issued thousands of pages implementing and addressing similar issues in other

⁶¹ ReplayTV, *ReplayTV Inc. Announces Strategic Direction for Future* (press release), Nov. 27, 2000, <<http://www.replaytv.com/new/pressrelease33.htm>>.

⁶² <<http://www.wink.com/contents/partners.shtml>>, <<http://www.opentv.com/customers/>>, <http://www.commerce-tv.com/home_fr_flash.html>.

⁶³ Different ITV companies collect their revenues from advertising, electronic commerce, subscriptions and licensing or operations fees. Monica Hogan, *ITVers Say Business Models Will Come*, <www.multichannelnew.com>, Feb 5, 2001.

proceedings involving access to facilities.⁶⁴ Given the possible broad scope of any ITV regulations, the regulatory burden that the Commission would assume with the adoption of any ITV regulations would be similarly daunting, and completely unnecessary at this point in time.

Throughout this process, the Commission would have to keep pace with an industry that is evolving and forming at break-neck speed. As recognized by Chairman Powell, the FCC's "bureaucratic process is too slow to respond to the challenges of Internet time."⁶⁵

C. The Commission Wisely Has Refrained From Regulating Other New Technologies In The Past

Regardless of how one ultimately defines or classifies ITV, there is no question that the technology still is in its formative stages. Previously, the FCC rightly has resisted calls to regulate other *new* technologies including FM subcarriers, television VBIs, telephone "dark fiber," electric utility fiber, "enhanced services" and DBS, citing numerous reasons, including market dynamics and promotion of rapid investment and deployment.⁶⁶ In the case of

⁶⁴ For example, the Commission did not finally implement the 1992 Act amendments to the leased access rules until almost four years later in 1996, only then to face judicial challenges that were not resolved until 1998. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access*, 11 FCC Rcd 16933 (1996); *ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998). Similarly, in the wake of Congress' sweeping reform of the telecommunications industry nearly four years ago, the Commission has issued numerous orders addressing the implementation of the fundamental interconnection, unbundling, and resale obligations of the 1996 Act. In addition, the Commission had to increase its "Full Time Equivalents (FTEs) devoted to policy and rulemaking activities by 50%" in two years. As a result, the Commission's budget request for 1997 was an increase of \$30 million from the previous year. See Statement of Reed Hundt, Chairman, Federal Communications Commission, on the FCC's Fiscal Year 1998 Budget Estimates, before the Subcommittee on Commerce, Justice, State, and Judiciary, Committee on Appropriations, U.S. House of Representatives, March 13, 1997, <<http://www.fcc.gov/Speeches/Hundt/spreh715.html>>.

⁶⁵ Powell 12/8 Remarks.

⁶⁶ See, e.g., *Amendments of Parts 2, 73, and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations*, 57 RR 2d 832, ¶ 15 (1985); *Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations* 48 FR 28445 (1983); see also *Southwestern Bell Tel. Co. v. Federal Communications Comm'n*, 19 F.3d 1475, 1484 (D.C. Cir. 1994)(reversing Commission determination that individual case basis ("ICB") dark fiber offerings were common carriage); *In re Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786, 6810 (1990)(recognizing that in some cases ICB services feature new technologies); *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (affirming FCC rejection of calls to impose common carrier or other legacy regulatory schemes on DBS).

“enhanced services,” the Commission determined that the enhanced services market was competitive, and that consumers were deriving benefits from this competition, and therefore the Commission declined to regulate enhanced services as common carriage under Title II of the Act.⁶⁷ Similarly, in deciding to exempt DBS from FCC multiple channel and cross-ownership rules “even before the service was born,” the Commission found that application of the rules during DBS’s nascency was “unnecessary” because the competitive forces in the industry were working.⁶⁸ Beyond the fact that a competitive market was developing without regulation, the Commission determined that the most important reason not to apply the rules was because any regulation of the nascent industry would “unduly hinder development of DBS systems.”⁶⁹

Recently, the Commission readily embraced a statutorily prescribed hands-off policy for advanced services and welcomed open and vigorous competition as the principal means of developing broadband infrastructure.⁷⁰ Although the Commission has issued a Notice of Inquiry concerning “open” or “forced” access to the Internet over cable systems,⁷¹ the Commission has,

⁶⁷ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 at 430-435, modified on reconsideration, Reconsideration Order, 84 FCC 2d 50 (1980), further modified on reconsideration, Further Reconsideration Order, 88 FCC 2d 512 (1981), aff’d sub nom. *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), aff’d on second further reconsideration, Memorandum Opinion and Order, FCC 84-190 (1984). See also *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC 2d 958 (1986).

⁶⁸ *National Ass’n of Broadcasters*, 740 F.2d at 1206.

⁶⁹ *Id.*

⁷⁰ 47 U.S.C. § 230(b)(2); *U.S. Government Working Group on Electronic Commerce, First Annual Report* (Nov. 30, 1998) (“*E-Commerce Report*”) at 25 (“The Administration . . . support[s] open and vigorous competition as the principal means of developing [broadband] infrastructure . . . [W]e seek to encourage competition among various technologies and industry segments in the development and deployment of advanced services”); *Broadband TodayReport*, at 47.

⁷¹ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (Sept. 28, 2000).

to date, resisted regulating cable modem service.⁷² Indeed, the Commission has advocated a non-regulatory approach given cable's lack of market power and the nascency of the broadband industry, accompanied by the fear that regulation would deter investment in and development of broadband networks.⁷³

As was the case for enhanced services, DBS and cable modem service, ITV is an industry still in its formative stages with significant investment outlay still ahead. The FCC should take the same "hands off" policy toward the regulation of ITV, at least during the industry's nascency, as it has for other new technologies.

⁷² The Commission noted in its first Section 706 report that "the preconditions for monopoly appear absent." *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398 at ¶ 48. In its orders approving the AT&T/TCI merger and then the AT&T/MediaOne merger, the FCC again rejected demands for government-mandated access. *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket 98-178, 14 FCC Rcd 3160 (1998); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket 99-251, 15 FCC Rcd 9816 (2000). In its second Section 706 report, released in August 2000, the Commission determined that "competition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability." *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, CC Docket No. 98-146, at ¶ 246 (rel. Aug. 21, 2000).

⁷³ In a letter to the Local and State Government Advisory Committee, former Chairman William Kennard responded to a request for a Notice of Inquiry regarding access to broadband networks by stating, "[t]here is no monopoly or even duopoly in broadband. In fact, when it comes to this very new market, there is a 'no-opoly.' . . . [A] formal proceeding focused exclusively on broadband access would undercut our goal of accelerating the deployment of broadband networks. A formal proceeding would chill investment in cable modem service." Letter from Former Chairman William Kennard, to Kenneth S. Fellman, Esq., dated August 10, 1999.

VI. CONCLUSION

For the foregoing reasons, the Commission should refrain, for the time being, from further considering regulation of the ITV services market.

Respectfully submitted,



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March 19, 2001

CERTIFICATE OF SERVICE

I, Debra G Holland, hereby certify that I have this 19th day of March, 2001, caused a copy of the foregoing, to be delivered by courier to the following:

Magalie Roman SALAS, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-B204F
Washington, DC 20554

Harold FURCHTGOTT-ROTH, Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, DC 20554

Susan NESS, Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, DC 20554

Gloria TRISTANI, Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, DC 20554

Michael POWELL, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, DC 20554

International Transcription Services, Inc.
445-12th Street, SW, Room CY-B402
Washington, D.C. 20554

Royce DICKENS
Federal Communications Commission
445 12th Street, SW, Room 3A729
Washington, D.C. 20554



Debra G. Holland

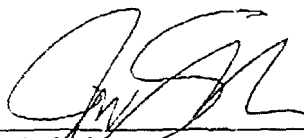
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Nondiscrimination in the
Distribution of Interactive Television Services
Over Cable

CS Docket No. 01-7

DECLARATION OF JUSTIN SMITH

I, Justin Smith, General Counsel, The Golf Channel, hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Golf Channel, Outdoor Life Network, Speedvision Network And The Weather Channel" and the factual statements contained therein that pertain to The Golf Channel are true and correct to the best of my knowledge, information and belief.


Justin Smith
General Counsel
The Golf Channel

March 19, 2001

**Before the
Federal Communications Commission
Washington, D.C. 20554**

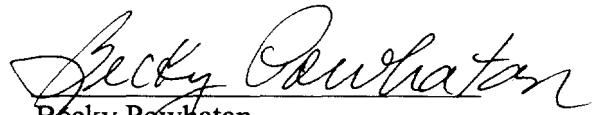
In the Matter of

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

CS Docket No. 01-7

DECLARATION OF BECKY POWHATAN

I, Becky Powhatan, Executive Vice President, Business Affairs and General Counsel, The Weather Channel, hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Golf Channel, Outdoor Life Network, Speedvision Network And The Weather Channel" and the factual statements contained therein that pertain to The Weather Channel are true and correct to the best of my knowledge, information and belief.



Becky Powhatan
Executive Vice President,
Business Affairs and General
Counsel
The Weather Channel, Inc.

March 19, 2001

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

CS Docket No. 01-7

DECLARATION OF BRAD FRIEDRICH

I, Brad Friedrich, Vice President, Interactive Media, Speedvision Network, hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Golf Channel, Outdoor Life Network, Speedvision Network And The Weather Channel" and the factual statements contained therein that pertain Speedvision Network are true and correct to the best of my knowledge, information and belief.



Brad Friedrich
Vice President, Interactive Media
Speedvision Network

March 19, 2001

Before the
Federal Communications Commission
Washington, D.C. 20554

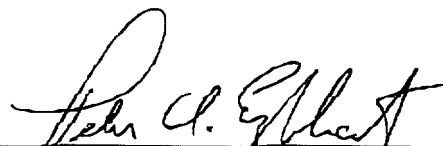
In the Matter of

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

CS Docket No. 01-7

DECLARATION OF PETER ENGLEHART

I, Peter Englehart, [TITLE], Outdoor Life Network, hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Golf Channel, Outdoor Life Network, Speedvision Network And The Weather Channel" and the factual statements contained therein that pertain to Outdoor Life Network are true and correct to the best of my knowledge, information and belief.


Peter Englehart
[TITLE] *Se. Vice President*
Outdoor Life Network

March 19, 2001

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